No. 95-1717

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID W. LANIER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

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1. The court of appeals held that only a decision of this Court, in factually similar circumstances, can make clear the existence of a Fourteenth Amendment due process right for purposes of a prosecution under 18 U.S.C. 242. Pet. App. 28a-29a. We argue in our petition that the court of appeals' holding is contrary to decisions of other circuits, and presents a serious practical threat to federal prosecution of civil rights offenses involving abuses of official authority by brutal physical assaults or rapes. We also argue that the court of appeals' decision is not supported by the reasoning or language of *Screws* v. *United States*, 325 U.S. 91 (1945).

Respondent makes little effort to defend the holding of the court of appeals. Indeed, he suggests, contrary

to the court of appeals, that a due process right might be established based upon "a clear consensus of circuit court decisions." Br. in Opp. 2 n.1. That suggestion is at odds with the decision below, which stated that "*Screws* limits the reach of § 242 to cases in which the Supreme Court itself for the nation as a whole has made a particular constitutional right sufficiently clear that a violation of that right constitutes a crime as well as a civil wrong." Pet. App. 29a. Our petition describes (at 17-18, 23-24) how the court of appeals' narrow rule will seriously impair the government's ability to prosecute and punish serious assaults and rapes by state officials misusing their official authority.

2. Respondent argues that Section 242 has no application in this case because the rape and sexual assaults here were not constitutional violations, but merely "personal, private actions." Br. in Opp. 3-4. An assault by a state official does not violate Section 242 if the defendant does not act "under color of law," *i.e.*, does not abuse official authority or the "pretense" of such authority. See *Screws*, 325 U.S. at 111; see also *United States* v. *Price*, 383 U.S. 787, 794-796 (1966).[1] But the jury correctly found in this case that respondent *had* acted under color of law when he sexually assaulted his victims. A panel of the court of appeals upheld that finding, expressly rejecting the argument that respondent had acted "merely for his

[1] Thus, respondent errs when he suggests that Section 242 "would apply as well to the conduct of a judge who beat up a lawyer in a barroom brawl." Br. in Opp. 4. Without proof that the judge had acted under color of law, that action could not be punished under Section 242.

own personal pursuits." Pet. App. 109a. The en banc court of appeals did not address that issue.

3. Respondent suggests that sexual assaults and rapes by state officials do not violate the Due Process Clause of the Fourteenth Amendment. See Br. in Opp. 4, 5. This argument may not be different from his "under color of law" contention, but to the extent that it is, it is also incorrect. A long series of decisions by this Court and lower federal courts has established that the Due Process Clause protects a fundamental right to bodily integrity, and has also established that this right includes the right to be free from unjustified physical assaults by state officials acting under the authority of their office. See Pet. 24-29 (discussing cases); see also Pet. App. 81a (Daughtrey, J., dissenting) (sexual assault is one of "the most blatant and serious invasions of the protected right to bodily integrity"). The argument that the fundamental right to bodily integrity does not include the right to be free from sexual assault has been squarely rejected. See, *e.g.*, *Doe* v. *Taylor Indep. School Dist.*, 15 F.3d 443, 451-452, 455 (5th Cir.) (en banc), cert. denied, 115 S. Ct. 70 (1994); *Stoneking* v. *Bradford Area School Dist.*, 882 F.2d 720, 726-727 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990).

Respondent suggests that it is inappropriate to rely on civil cases decided under 42 U.S.C. 1983 to determine whether a constitutional right has been made specific for purposes of a criminal prosecution under Section 242. Br. in Opp. 3. But the same constitutional rights are protected by Section 1983 and Section 242; indeed, Section 1983, like Section 242, is not a source of substantive constitutional rights, "but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham* v. *Connor*,

490 U.S. 386, 393-394 (1989). Congress intended the two statutes to cover the same conduct. See, *e.g.*, *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 662 (1979) (White, J., concurring in the judgment). "There is thus nothing wrong with looking to a civil case brought under [Section] 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a section 242 charge." *United States* v. *Reese*, 2 F.3d 870, 884 (9th Cir. 1993), cert. denied, 114 S. Ct. 928 (1994); accord *United States* v. *Cobb*, 905 F.2d 784, 788 n.6 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991); *United States* v. *Bigham*, 812 F.2d 943, 948 (5th Cir. 1987).

Respondent also suggests that any constitutional right to be free from assaults is limited to "custodial assaults," such as assaults on arrested persons and prisoners. Br. in Opp. 6. Many of the reported cases do involve custodial situations, reflecting the fact that state officials have greater opportunity to commit physical and sexual assaults under the authority of their office when victims are in their custody. The existence of the right to be free from official rape and assault is not confined to that context, however. The fundamental right to bodily integrity has been recognized in both criminal and civil cases involving assaults by state officials who have abused the power of their office in non-custodial settings. See *United States* v. *Tarpley*, 945 F.2d 806 (5th Cir. 1991) (Section 242 prosecution of physical assault by police officer of wife's former lover in his own home), cert. denied, 504 U.S. 917 (1992); see also *Dang Vang* v. *Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991) (rape by welfare official); *Shillingford* v. *Holmes*, 634 F.2d 263 (5th Cir. 1981) (assault on photographer by police officer);

Gregory v. *Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (assault by justice of the peace in his courtroom).

4. Respondent argues that proof of a violation of rights protected by the Due Process Clause cannot be dependent on an instruction to the jury that the defendant's conduct must "shock the conscience," and that use of that standard "underlines the vagueness of the constitutional concept." Br. in Opp. 4-5.

Respondent overlooks the point that Section 242 criminalizes only *willful* deprivations of constitutional rights. Under the standard of specific intent made applicable to Section 242 by *Screws*, a defendant "violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law. He who defies a decision interpreting the Constitution knows precisely what he is doing. If sane, he hardly may be heard to say that he knew not what he did." 325 U.S. at 104-105. "Once the section is given that construction, * * * the claim that the section lacks an ascertainable standard of guilt must fail." *Id.* at 103. See also *Clark* v. *United States*, 193 F.2d 294, 296 (5th Cir. 1951); *United States* v. *O'Dell*, 462 F.2d 224, 232 n.10 (6th Cir. 1972). In accordance with *Screws*, the jury was instructed that it could not find respondent guilty unless he acted willfully in violation of the victims' rights.[2]

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[2] The "shocks the conscience" instruction was read as an additional safeguard for respondent and in this case worked to respondent's benefit; the court used it, and elaborated upon it, to caution the jury that even physical abuse must be "serious and substantial" to constitute a violation of a constitutional right. See Pet. 8 (quoting C.A. App. 884-885). Similar language is used in other criminal law contexts to identify sanctionable conduct. For example, the basic Fourth Amendment inquiry in excessive force cases is one of objective reasonable-

5. Finally, respondent argues that the court of appeals' decision is consistent with the Court's unwillingness to permit an "open-ended" definition of due process rights, lest all torts by state officials become federal crimes. Br. in Opp. 7-8 (citing *Paul* v. *Davis*, 424 U.S. 693 (1976)). That concern has no relevance in the context of severe assaults upon the person by state officials acting under color of law—actions that have long been recognized to constitute invasions of a fundamental liberty interest protected by the Due Process Clause. See *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316, 324 (1982); *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977). This is not a case where it is argued that the Due Process Clause itself "extend[s] * * * a right to be free of injury wherever the State may be characterized as the tortfeasor." *Paul* v. *Davis*, 424 U.S. at 701.

Respondent contends that there is no reason for the Court to convert an ordinary matter of state criminal law into a matter for federal jurisdiction. Congress, however, enacted Section 242 because state remedies will not always be effectively available to those whose rights have been violated by state officials. Thus, in

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ness under the circumstances. See *Graham* v. *O'Connor*, 490 U.S. at 396-397. Juries in such cases prosecuted under Section 242 must distinguish "reasonable" from "unreasonable" force. See also *Hudson* v. *McMillian*, 503 U.S. 1, 8-10 (1992) (objective component of Eighth Amendment inquiry must look to "contemporary standards of decency," and use of force must not be "of a sort 'repugnant to the conscience of mankind' "); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438-443 (1978) (antitrust laws may form basis of criminal violations despite "indeterminacy of the Sherman Act's standards"); *Miller* v. *California*, 413 U.S. 15, 30-33 (1973) (obscenity may be punished only if jury finds it violates "contemporary community standards" of decency).

the instant case, although respondent's rapes and sexual assaults certainly violated state law, respondent and his family "occupied positions of power and political authority in * * * Dyer County, Tennessee, for several generations[,] [and thus] [i]t was clear that [respondent] was not going to be called into account for his misdeeds and judicial misconduct by local or county officeholders who had been beholden to the longstanding sway of the Lanier dynasty." Pet. App. 34a (Wellford, J., concurring in part and dissenting in part); see also Pet. 3. Application of Section 242 in cases like this one is fully consistent with Congress's objective of "provid[ing] a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe* v. *Pape*, 365 U.S. 167, 174 (1961).

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For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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